

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DAVID V. AYRES)	
Claimant)	
VS.)	
)	Docket No. 186,640
KANSAS FARM BUREAU)	
Respondent)	
AND)	
)	
FIDELITY & DEPOSIT COMPANY OF MARYLAND)	
Insurance Carrier)	

ORDER

Respondent appeals from an Award entered by Administrative Law Judge Bryce D. Benedict, dated March 17, 1997. The Appeals Board heard oral argument August 13, 1997.

APPEARANCES

John M. Ostrowski of Topeka, Kansas, appeared on behalf of the claimant. Stanley E. Oyler of Topeka, Kansas, appeared on behalf of the respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Appeals Board has reviewed and considered the record listed in the Award. The Appeals Board, also, has adopted the stipulations listed in the Award.

ISSUES

Respondent asked the Appeals Board to review the findings and conclusions relating to the nature and extent of claimant's disability. Respondent asked the Appeals Board to reduce the amount of work disability awarded. Claimant contends, on the other hand, that he should be entitled to a higher work disability. Claimant also asks for additional temporary total

disability benefits during a period of vocational rehabilitation. Finally, claimant also asked for an order for ongoing medical treatment with William T. Jones, M.D.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

For the reasons stated below, the Appeals Board concludes that claimant should be granted benefits based upon a 56.5 percent work disability. Claimant is not entitled to additional temporary total disability benefits. Future medical benefits should be granted upon proper application and approval by the Director.

Claimant, night supervisor of respondent's janitorial staff, injured his back on February 12, 1993. Respondent has stipulated that the injury was compensable, and the parties have agreed claimant sustained a 15 percent permanent partial impairment of function.

Claimant received treatment from Dr. William T. Jones. Dr. Jones provided treatment from March 1, 1993, through September 15, 1994. Based upon examination, x-rays, and MRI testing, he diagnosed a herniated disc at L4-L5. Dr. Jones recommended the following restrictions:

1. Avoid repetitive vibratory forces.
2. Avoid repetitive bending, lifting, and twisting, even with light weights.
3. Ideally needs a job that combines short periods of sitting with short periods of standing.
4. Avoid remaining in one particular position more than an hour at a time
5. Avoid repetitive overhand and floor-to-waist lifting.
6. Carrying weights up to 50 pounds at waist level could be accomplished safely.

The Appeals Board finds that as a result of his injury claimant was unable to return to his employment with respondent and has not since engaged in employment at a comparable wage. He is, therefore, entitled to work disability as defined in K.S.A. 1992 Supp. 44-510e as:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than percentage of functional impairment.

Two vocational experts, Monty D. Longacre and Richard W. Santner, testified regarding claimant's loss of ability to earn wages and loss of ability to access the open labor market. Mr. Longacre testified that, in his opinion, claimant had a loss of ability to obtain and retain

employment in the open labor market of 47 percent. He also testified that claimant had a loss of ability to earn wages of 0 to 10 percent. The Administrative Law Judge disregarded the opinions expressed by Mr. Longacre, and the Appeals Board agrees. First, Mr. Longacre uses, in calculating the potential post-injury wage, the job category of landscape contractor. He did so based, in part, upon evidence that claimant had resumed a lawn business after he left the employment with respondent. The Appeals Board does not, however, consider the work claimant did post-injury to be comparable to that of a landscape contractor. Claimant, in effect, had a lawn-mowing service.

The Appeals Board also agrees there are flaws in the conclusions of Mr. Longacre regarding the percentage of loss of ability to obtain employment in the open labor market. Specifically, Mr. Longacre has excluded the very heavy work from the pre-injury labor market, and the Appeals Board agrees with the Administrative Law Judge that the record does not support that exclusion pre-injury. It also appears that Mr. Longacre relied upon the loss of job titles rather than jobs. The Appeals Board concludes that Mr. Longacre's opinion understates the loss of ability to obtain and retain employment in the open labor market.

Mr. Santner gave two opinions regarding loss of access to the open labor market. He first testified that, in his opinion, claimant's labor market loss was 60 percent. Mr. Santner was then asked about restrictions against remaining in one particular position for more than one hour at a time. Dr. Jones suggested that this would be ideal. Mr. Santner testified that if that were considered a work restriction that he would estimate the loss of access to the open labor market to be 90 percent. Respondent contends, and the Appeals Board agrees, that Mr. Santner's 90 percent opinion appears more in the nature of last minute speculation than reliable opinion. The Appeals Board also concludes that the 90 percent overstates claimant's loss. The Appeals Board finds most reliable Mr. Santner's opinion the claimant has a loss of ability to obtain and retain employment of 60 percent.

Mr. Santner also states that, in his opinion, claimant has the ability to earn \$253.00 per week. The Appeals Board finds most reliable Mr. Santner's opinion based upon claimant's ability as opposed to what he was earning in his current lawn service. The Appeals Board notes that the Administrative Law Judge used \$235.00 and assumes that he has transposed his numbers as Mr. Santner's opinion projected an earning ability of \$253.00 per week. When compared to the stipulated pre-injury average weekly wage of \$538.16, the loss of wage earning ability is 53 percent.

Giving equal weight to the 53 percent loss of wage earning ability and the 60 percent loss of access to the labor market, the Appeals Board finds that claimant is entitled to a work disability of 56.5 percent.

Claimant requests additional temporary total disability benefits during a period which he describes as a period of vocational rehabilitation plan. Claimant, then pro se, proposed a vocational rehabilitation plan. Respondent objected and claimant did not proceed further. There was no approved vocational rehabilitation plan and, for that reason, the Appeals Board concludes it would be inappropriate to award the additional request for temporary total disability benefits.

Finally, although claimant has continued to take over-the-counter medications, the Appeals Board finds no reason to award specific medical treatment at this time. Claimant is entitled to and is awarded future medical treatment upon application and approval by the Director.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Bryce D. Benedict, dated March 17, 1997, should be, and is hereby, modified.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, David V. Ayres, and against the respondent, Kansas Farm Bureau, and its insurance carrier, Fidelity & Deposit Company of Maryland, for an accidental injury which occurred February 12, 1993, and based upon an average weekly wage of \$538.16 for 27.72 weeks of temporary total disability compensation at the rate of \$299 per week or \$8,288.28, followed by 387.28 weeks at the rate of \$202.72 per week or \$78,509.40, for a 56.5% permanent partial work disability, making a total award of \$86,797.68.

As of September 30, 1997, there is due and owing claimant 27.72 weeks of temporary total disability compensation at the rate of \$299 per week or \$8,288.28, followed by 213.85 weeks of permanent partial compensation at the rate of \$202.72 per week in the sum of \$43,351.67 for a total of \$51,639.95, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$35,156.73 is to be paid for 173.43 weeks at the rate of \$202.72 per week, until fully paid or further order of the Director.

The Appeals Board approves and adopts all other orders not inconsistent herewith.

IT IS SO ORDERED.

Dated this ____ day of September 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: John M. Ostrowski, Topeka, KS
Stanley E. Oyler, Topeka, KS
Bryce D. Benedict, Administrative Law Judge

DAVID V. AYRES

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Philip S. Harness, Director